Brexit and the CJEU: why the Opinion of the Court Should be Sought as a Matter of Emergency

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With the comfortable majority he managed to secure in the Commons, Boris Johnson is now very likely to be able to push through the British Parliament the withdrawal agreement he negotiated with the European Union back in October. Provided that the European Parliament greenlights it quickly enough, it may well come into force by 31 January 2020, deadline of the last extension decision agreed between the EU-27 and the UK. However, one actor of the process seems to have been forgotten: the Court of Justice of the European Union. This could end up being a huge mistake.

According to Article 218(11) TFEU, “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.” Yet, no Member State, none of the institutions mentioned in this provision has expressed their intention to seek the opinion of the Court.

One might think they have no interest in doing so. After all, bringing the matter to the Court might well thwart all the efforts made in order to reach an agreement if the Court happens to find the agreement illegal. However, I argue that there is a much bigger risk in not doing so.

Part of EU Law

Once the Brexit agreement comes into force, it will be a part of EU Law. As such, it will be open to legal challenges, the same way any piece of EU legislation is. In particular, it may be challenged by way of a reference for a preliminary ruling, issued by a national court to the Court of justice, if the question of the validity of the agreement arises during a domestic litigation in any EU Member State post Brexit. It happened before for international agreements of the EU.

Who would have any interest in challenging the agreement? After all, it does secure a transition period in order to mitigate the effects of Brexit, it crystallises the rights of citizens and it provides an arrangement for the Northern Ireland situation. Yet, one cannot dismiss the possibility of such a legal challenge. Think, for example, of unionists in Northern Ireland who would be displeased by the establishment of customs checks on goods between Northern Ireland and Great Britain, as a consequence of the agreement. Think of employees of a company in the EU made

redundant by their employer because their company has decided to relocate their operation in Northern Ireland, in order to enjoy its privileged situation under the agreement (it will be legally a part of the UK customs territory and *de facto* part of the European customs union).

Would the Court accept to review the agreement? It is extremely difficult to tell because there is no precedent. Does it even make sense to review the legality of a withdrawal agreement? After all, we know that accession agreements can marginally amend the EU treaties. It would therefore be possible to imagine that withdrawal agreements can do that too, withdrawal being a sort of accession in reverse. Yet, there is no certainty here. Article 49 TEU explicitly provides that accession treaties may contain “adjustments to the Treaties”. Article 50 TEU provides nothing of the sort regarding withdrawal agreements. In any case, the Court must at least be able to review whether the withdrawal agreement falls within the powers that Article 50 TEU grants to the EU institutions in order to agree on an orderly withdrawal. This is a rule of law issue. The European Union cannot use Article 50 TEU as a pretext to exceed the boundaries of its own powers.

Arguably illegal

Are there grounds for illegality in the agreement? Again, for lack of precedent, it is impossible to be sure, but there might be arguable points. For example, can’t we consider that the purpose of Article 50 TEU is only to make transitory arrangements aimed at mitigating the impact of the withdrawal? It could be argued that the light procedure laid down for the approval of the withdrawal agreement (the Council voting at qualified majority, no national ratifications) is only consistent with temporary measures. If this is the case, the Court might find it difficult to reconcile certain provisions of the agreement with this purpose, for example the fact that citizens’ rights will be guaranteed for the lifetime of said citizens, or the fact that the “backstop” for Northern Ireland may be applicable forever. Again, I am not saying that the withdrawal agreement is illegal, just that nobody can say for sure that it is legal.

Surely, even if the agreement was indeed found illegal, the Court could, and probably would, mitigate the blow, for example by not declaring the agreement invalid immediately but from a certain date in the future, letting the EU and the UK some time to negotiate a new agreement. However, it is quite easy to understand how that would open a Pandora’s box.

This is why either a Member State or one of the EU institutions listed in Article 218(11) TFEU should ask the Court for its opinion as soon as possible. Sure, it might delay, and even derail the Brexit process. But the alternative – the agreement being declared invalid post Brexit – is much worse in terms of legal chaos.

It is true that there is no certainty that Article 218(11) TFEU applies to agreements based on Article 50. First, Article 218 TFEU is applicable, according to its first subparagraph, to “agreements between the Union and third countries or international organisations”. So far, the United Kingdom is still a member State. Second, Art. 50

TEU explicitly refers to Article 218(3) TFEU for the organisation of the negotiation of the agreement. One might therefore argue that if the drafters had wanted to make Art. 218(11) TFEU applicable to the withdrawal agreements, they would have said so. These arguments are serious, but unconvincing. First, according to Art. 50 TEU, the entry into force of the withdrawal agreement has the effect of “transforming” the withdrawing member State into a third State – and therefore transforming itself into an international agreement. Second, and above all, the main rationale of Art. 218(11) TFEU is to make sure that the question of legality of international agreements is dealt with before they come into force, in order to avoid the very serious problems that could arise when the illegality of an agreement is discovered while already into force. As we have seen, the exact same issue applies to the withdrawal agreement.

Trying to avoid the Court of Justice is somehow understandable. The whole Brexit process has been so messy already that it may seem hardly advisable to add new sources of uncertainty. However, since the European Union is based on the rule of law, the question of the legality of the agreement cannot be avoided for ever: it can, at best, be postponed, with potentially much more serious consequences. When one tries to circumvent the rule of law, the rule of law bites back. With interests.